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David Lefkowitz

University of Richmond, dlefkowi@richmond.edu

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Debate: Legitimate Authority, Following Orders, and Wars of Questionable Justice^{*}

DAVID LEFKOWITZ

Philosophy, University of Richmond

In an article published in this journal several years ago, David Estlund argued that subjects of a state with a morally justified claim to political authority have a duty to obey its legal commands to wage a particular war, even if they believe, perhaps rightly, that the state has erred in judging that war to be one it is morally permissible to fight.¹ In what follows I trace out two implications of Estlund's argument that go unnoted in the original article. Some of those with whom I have shared these arguments view them as *reductio ad absurdum* refutations of Estlund's argument. I believe the opposite to be true; that is, if anything, these implications make Estlund's argument more compelling, though they do so partly by restricting the number of cases in which combatants have a moral duty to comply with legal orders to wage an unjust war (or, as will become clear, to not wage a just war). If correct, the conclusion I draw strengthens the case for a position intermediate between one that characterizes most combatants as incapable of assessing

the justice of the wars in which they fight, and therefore not responsible for making or acting on such an assessment, and one that depicts them as not only capable of, and responsible for, evaluating the justice of the war they wage, but also for acting on that evaluation.² Estlund can agree with proponents of the latter view that combatants are able to assess the justice of the wars they wage. Yet, because he maintains that under certain conditions combatants have a duty to act on a legitimate authority's judgment of the war's justice, rather than on their own, he can (and does) endorse the claim made by proponents of the first view that individual combatants should not be held responsible for the injustice of the war they wage. I suspect that many will find this combination of views more attractive than either of the rival positions sketched above.

On Estlund's view, when certain conditions are met the legal command of a legitimate state can make it morally obligatory for a combatant to act in ways that wrong others. Since talk of a moral duty to wrong others will likely strike many as contradictory, I begin with a brief clarification of the position to be defended. Estlund writes that:

[U]nder the right conditions, even though the victim is wronged by the unjustly warring side, the soldier on that side is nevertheless morally obligated (and so morally permitted) to follow all normally binding orders – those that would be binding at least if the war were just. ...Even when the killing wrongs the person [the innocent victim], the person doing the killing is not always acting wrongly.³

The key to squaring this circle lies in the attribution of the wrong to the state. If an unjust combatant waging war on behalf of a legitimate state kills his victim as part of an effort to

comply with his legal superiors' command, then he does not act wrongly. Rather, the state acts wrongly in commanding him to fight in an unjust war. Thus it is the state that is the proper object of judgments of responsibility for the wrongful killing (i.e., the proper object of blame, punishment, and claims for reparations). Needless to say, this depiction of who bears responsibility for wrongdoing stands in need of a lengthy defense, one I cannot offer here. Rather, in suggesting that the state but not the soldier wrongs the innocent victim, I merely hope to enable the reader to (at least provisionally) see past what may at first seem a clear and insurmountable barrier to an argument for a moral duty to follow orders to wage an unjust war.

I.

Estlund argues that officials have a moral duty to obey a legal order, even if they (rightly) believe that the commanded act is an unjust one, if (and only if?) the following conditions are met.

- 1) *The Justifiable Act-Type Condition*: The particular act is of a type that is justifiable under certain conditions, even if those conditions are not actually met in the case at hand.
- 2) *The Truth-Tracking Condition*: The order is the result of a process that those subject to it have good reason to believe tends to track the truth. That is, the process is one that tends to result in commands to perform particular acts only in cases where the conditions sufficient (and perhaps necessary) to justify those acts actually obtain.

- 3) *The Good Faith Condition*: Those subject to the order have good reason to think that those issuing the order genuinely believe that the conditions sufficient (and perhaps necessary) to justify the commanded act do obtain in this case.
- 4) *The Reasonable Procedure Condition*: Given the fact, or the possibility of, reasonable disagreement over what the truth is, and over who knows it (i.e., who can claim to be a moral expert), the procedure leading ultimately to the command to perform such acts must be one that can be defended to all reasonable points of view.

The following example illustrates his claim, and perhaps generates some intuitive support for it. Suppose that despite the fact that the trial procedure is a fair one, and that all those who participate in it make a conscientious effort to properly discharge their roles in that procedure, a criminal trial results in the conviction of an innocent man. Or, in a different but equally relevant version of the example, the trial results in an unjustly harsh sentence, one disproportionate to the moral seriousness of the crime for which the prisoner has been convicted, and/or to the good to be achieved by imprisoning the convicted person. In both cases, the jailer (rightly) believes that compliance with the jury's (or the Court's) order entails wronging the prisoner.⁴ Assuming that the jailer could free the prisoner, and that he has no other moral reasons not to do so, is the jailer permitted, or even obligated, to act on his own judgment in this case or must he instead act as the Court commands?

Estlund maintains the latter, and offers the following points in defense of his claim. First, the legally required act in question is not a token of a type that is never morally justifiable. Rather, it is just that in this case the jailer believes that one or another of the conditions that must be met in order for that act (e.g., imprisonment for a certain number of years) to be justified is not met. Second, the jailer has good reason to believe that the procedure resulting in the

prisoner's conviction and sentencing have a tendency to track the truth; that is, to convict only the guilty and to give them an appropriate punishment. Finally, given the possibility of reasonable disagreement over the guilt or innocence of the accused, and the morally proper response to him should he be found guilty, trial by a jury drawn from his fellow citizens is the only procedure for settling these disputes that can be defended to all reasonable points of view. Against such a background, were the jailer to act on his own judgment rather than deferring to the Court, he would be implicitly asserting his moral superiority to his fellow citizens. That is, embedded in the jailer's judgment that the Court has erred is a claim to moral expertise, or at least relative superiority, that Estlund claims the jailer cannot defend. Put the other way around, the jurors can reasonably contest the jailer's claim to know better than they do what morality requires or forbids in this case.⁵ Given that, in circumstances characterized by reasonable disagreement over what morality requires, the jailer cannot reasonably challenge the use of a fair and responsibly conducted jury trial to determine what the state ought to do to a person accused of a crime, it follows that the jailer has a duty to obey the Court's order even if he (rightly) believes it to be mistaken. In short, if an agent is given a command arrived at via a process with a tendency to "get it right" morally, that responds appropriately to the fact of reasonable (moral) disagreement, and that commands an act that would be just were things as those giving the command genuinely believe them to be, then that agent has a duty to carry out the command.

Estlund contends that the same argument applies even when the legally ordered act in question involves killing, be it the execution of a person (wrongly) sentenced to death, or a lethal attack on an enemy combatant in an unjust war. Of course, commands to go to war are not issued by a jury. Estlund maintains, however, that there is a suitable analog in the guise of an adequately democratic state, one whose institutions constitute a process of political deliberation

and decision-making that has both some tendency to “get it right” morally and that responds appropriately to the fact of reasonable disagreement. Given the role that the institutions of a democratic state play, directly and indirectly, in the process that leads ultimately to the issuance of a judgment that a war is justifiable, those actors the democratic state commands to fight in the war have a duty to do so, even if they think (rightly) that the war is unjust.

II.

Suppose that the tendency of democratic decision procedures to get it right when it comes to waging only just wars makes a significant contribution to the case for soldiers’ duty to defer to the judgment reached via such a procedure, and so a duty to fight in what they (rightly) believe to be an unjust war. It does not follow necessarily that a soldier should defer to the judgment of the democratic state that employs him, rather than that of some other democratic state. This is especially so if, when it comes to assessing the justifiability of going to war, the soldier has reason to think that the democratic decision procedures employed by another state do a better job of tracking the truth than do those of the soldier’s state, and/or that in this particular case officials of the soldier’s state are more likely to suffer from bias and conflicts of interest than are the officials of some other adequately democratic state. So for example, suppose that in 2003 both the United States and Sweden were governed via adequately democratic decision procedures with a tendency to go to war only when they were justified in doing so. Why should a U.S. soldier defer to the judgment of the U.S. government regarding the (moral and legal) justifiability of invading Iraq, rather than that of Sweden’s? In light of the history of Iraqi-U.S. relations since

the early 1990s, the emotionally charged atmosphere following the 9/11 terrorist attacks, and the long-lived and close connections between some high ranking officials in the U.S. government and oil companies that stood to profit enormously from a friendlier Iraqi government, he would have had good reason to worry about the impact of various biases and conflicts of interest on the judgment of the U.S. government regarding the justifiability of war with Iraq. In contrast, as far as I know the soldier would have had no reason to suspect Swedish officials of suffering from any bias or conflict of interest, nor any reason to think that the truth-tracking quality of Swedish political institutions was far inferior to that of U.S. political institutions. It appears, then, that on epistemic grounds the soldier should have deferred to Sweden's judgment that an American-led invasion of Iraq would be unjust, rather than obeying an order issued by his superiors to join in that invasion. Note, too, that the procedure employed by Sweden has at least as much claim to be a reasonable one as does that employed by the U.S. This is a crucial point, since were it not so then the fourth of the conditions for legitimate authority set out above might not be met, with the consequence that the U.S. soldier might have a moral obligation to defer to the judgment of the U.S. regarding the justice of invading Iraq, even if the Swedish government were more likely to make a correct judgment on that matter.⁶

The reader might protest that the U.S. government had access to intelligence that the Swedes lacked regarding the Iraqi military and its biological, chemical, and nuclear weapons activities and plans. Even if that is true, and even if the intelligence had turned out to be far more accurate than it was, it would not necessarily follow that the soldier had more reason to defer to the judgment of the U.S. than to that of Sweden. This is so because the justifiability of invading Iraq turned not just on non-normative factual questions (e.g. did the Iraqi's have an on-going nuclear weapons research program?) but also on normative ones, such as whether

preventive war, or even preemptive war, is morally (or legally) justifiable, and whether (morally and/or legally) the invasion required explicit authorization by the U.N. With respect to these questions, I suggest that a U.S. soldier in 2003 would have had reason to think the Swedes more likely to get it right than the Americans (even if, in fact, the Swedes got it wrong and the Americans got it right).

It is not clear on Estlund's view how significant a contribution the epistemic criterion—that is, the tendency of a democratic decision procedure to track the truth—makes to justifying a state's claim to authority. In fact, it may be that most of the justificatory work is done by the requirement that political justification be acceptable to all reasonable points of view. As the discussion of the imprisonment example made clear, were the jailer to act on his own judgment rather than deferring to the Court's, he would be implicitly making a claim to moral expertise that he could not justify to all reasonable points of view. Or in other words, given that the Court's judgment was a reasonable one, the jailer could not justify acting on his own judgment rather than deferring to the Court. Might the necessity of being able to publicly justify his action to all reasonable points of view provide the basis for arguing that a soldier in the U.S. military ought to defer to the U.S. government's judgment regarding the justice of war with Iraq, rather than to the Swedish government's judgment? I do not see how it does so. The soldier does not privilege his own judgment regarding the justice of invading Iraq over that of all other agents, nor does he implicitly claim any moral expertise. Rather, he defers to the judgment of a democratic decision procedure, which is precisely what Estlund argues agents ought to do in cases where there is reasonable disagreement over the morally proper course of action. Of course, the soldier does act on his own judgment regarding which democratic decision procedure is most likely to get it right. Yet at some point each individual must judge for himself or herself

whether the state meets those criteria necessary to justify its claim to authority.⁷ It is not clear why that inquiry should not also include determining whether, of those regimes that can be defended within public reason, some state other than the one that claims the agent as a subject is more likely to track the moral truth (generally, or in this particular case).⁸

Perhaps the most promising basis on which to argue that a U.S. soldier has a duty to obey the U.S. but not the Swedish government is that he has voluntarily joined the U.S. armed forces and not the Swedish ones. By agreeing to obey all lawful orders issued by his superiors, the soldier places himself in a special relationship vis-à-vis the U.S. government, one that he does not have to Sweden. Note, first, that this argument establishes a duty to obey a state's command to wage an unjust war only for those who voluntarily join that state's armed forces. Some further argument will be necessary to show that conscripts also have such a duty, and even among putative volunteers it may be that only those whose decision to enlist is informed and made against a background of reasonable options actually acquire a duty to obey the lawful orders of the state in whose armed forces they serve. Second, consent may obviate the requirement that a state be democratic in order to enjoy legitimate authority. It is not typically the case that one agent's consent to do as another directs depends on that person's command being one that is justifiable to all reasonable points of view. Perhaps it is different in the case of consent to rule by a state or political community. But if not, and if the case for democratic authority rests almost entirely on the requirement of public justification, then it follows that consent can generate a particularized duty of obedience regardless of a state's democratic credentials.

Third, most theorists maintain that one cannot acquire a duty to act immorally. For example, given a duty not to facilitate murder, a voluntary agreement to lend a criminal assassin the use of your gun is *void ab initio*, and so creates no duty to lend the gun or to compensate the

assassin for failing to do so. Similarly, if a U.S. soldier has good reason to think that the U.S. government errs when it concludes that invading Iraq is just, he ought to view his government's command to go fight in Iraq as an act he cannot possibly acquire an obligation to perform.⁹ Even consent, then, may not provide a solution to the problem of particularity. This point should not be overdone, however. It is possible that in some cases the soldier's own state will be the one he has most reason to believe will judge correctly the justice or injustice of a given war. In those cases the soldier does have a consent-based duty to obey his legal superior's commands, even if his state's judgment that war is justified in this case turns out to be mistaken, and the soldier believed this to be the case. Notice, however, that the combatant's duty is not grounded in any special relationship he has to his state; rather, it follows from a contingent fact about the state's relative epistemic superiority.

III.

Thus far I have assumed that what is at issue is a combatant's duty to obey a legal order to fight in what he (rightly) believes to be an unjust war. Now I want to consider the opposite case; that is, a situation in which a combatant is ordered *not* to engage in what would be a just war. If states never have a duty to go to war, but only a right to do so (in some cases), then a situation like this is of considerably less moral interest than the one on which I have focused thus far. This is so because in refusing to fight a war that it has a right but not a duty to wage, a state does not wrong anyone, and so neither do its soldiers. Suppose, however, that states have a Samaritan duty to go to war if there is good reason to believe that it is practically necessary to prevent a

great injustice. By a Samaritan duty I mean one that an agent must discharge only if he can do so at a reasonable cost to his own interests, while by ‘a great injustice’ I mean to indicate only the gravest of those injustices that provide a just cause for war. For my purposes, large-scale genocide and ethnic cleansing count as great injustices, while the seizure of a portion of a state’s territory, with relatively little harm done to its inhabitants or its natural and built environments, does not. If such a duty exists, what should a combatant do in a situation where he and a certain number of his comrades in arms are in a position to initiate an armed humanitarian intervention, and he believes (rightly) that his state has a Samaritan moral duty to carry out that intervention, but his state has ordered him not to do so?

On the one hand, Estlund’s argument may have the same implication in this case as it does in a case where the state orders a soldier to fight in (what is actually) an unjust war. If the state’s judgment has been reached via a process with some tendency to track the moral truth, while also recognizing the equal right of all its citizens to determine (indirectly) what the state ought to do, then the combatant ought to comply with that judgment even if he (rightly) believes it to be mistaken. On the other hand, Estlund does acknowledge the possibility of an exception to the principle that an official in the service of a legitimate state has a duty to obey its commands. Specifically, if the legal official has first-hand knowledge of the order’s injustice so that he knows “with as much certainty as life allows” that obeying the order will result in the wrongful treatment of the victim, then perhaps he is permitted (or even obligated) to disobey it.¹⁰ Estlund suggests that no such situation could arise with respect to the decision to initiate a war, but I want to consider one case that might prove him wrong, namely that of the United Nations Assistance Mission for Rwanda (UNAMIR) in the weeks and days leading up to the Rwandan Genocide.

On January 11th, 1994, General Romeo Dallaire, the military commander of U.N. forces in Rwanda, sent a fax to his superiors at the United Nations.¹¹ In it he described in some detail the preparations that those aligned with the Hutu Power movement were making for an extermination campaign aimed at Tutsis and tens of thousands of Hutus judged to be opposed to, or simply insufficiently supportive of, the movement's political goals. He also reported his intention to carry out a raid on an arms cache members of the Hutu Power movement had created in anticipation of their genocidal attack. Dallaire believed that he was already authorized to carry out this raid under his existing rules of engagement, and in remarks made before a U.S. Congressional committee only a few months later Kofi Annan, then the head of all U.N. peacekeeping operations, appeared to corroborate Dallaire's belief. Nevertheless, that same day Dallaire received a fax from U.N. headquarters, sent under the name of Kofi Annan and signed by his deputy Iqbal Riza, in which he was ordered not to carry out the raid. More generally, Dallaire was forbidden from taking any action to prevent what he believed to be a looming genocide, other than sharing what he knew with the Hutu president of Rwanda, Habyarimana, which Dallaire (and, probably, his superiors) knew would be a wholly ineffective response. On many subsequent occasions, Dallaire has stated that with the troops at his disposal at that time he could have done much to mitigate the subsequent deaths of hundreds of thousands of Rwandans, especially had he been permitted to move against agents of the Hutu Power movement months before the genocide began. Our question, then, is this: was General Dallaire morally permitted, and perhaps even obligated, to disobey his legal superiors' order not to initiate an armed intervention, or was he instead morally required to obey this command even though he (rightly) thought it required him to act unjustly?

What would General Dallaire have needed to know if he were to be justified in initiating an armed intervention to prevent (or at least mitigate) the ensuing Rwandan genocide, in contravention of his legal orders? Various facts about the organization and intentions of those who instigated the genocide, of course, as well as facts about the ability of the troops at his disposal to prevent or at least contain it, and the risks they were likely to confront if they attempted to intervene. But as I noted earlier, normative judgments play at least as important a role as do non-normative ones in settling whether an agent ought to go to war. Thus General Dallaire would have had to make a judgment regarding the existence of a Samaritan duty to use force if necessary to forestall genocide. Perhaps he should have concluded that the existence of such a duty was a matter of reasonable disagreement, with the implication that he ought to defer to the judgment of the political body employing him (or at least its adequately democratic member states, especially Belgium, France and the U.S., who were the primary democratic states concerned with events in Rwanda). Yet on the basis of hundreds of public statements that the world should never again stand-by while genocide occurs, the existence of the Convention on the Prevention and Punishment of Genocide, and other such evidence, he might just as well have reasoned that no reasonable agent would deny the existence of a duty to prevent or limit genocide if it could be done at a reasonable cost. Certainly many events after the Rwandan genocide began, such as the efforts by a number of states including the U.S. to deny that what was happening in Rwanda was genocide for fear of the legal and moral consequences that would follow from such an admission, and later remarks by many officials echoing Madeline Albright's claim (as U.S. Secretary of State) that "we—the international community—should have been more active in the early stages of the atrocities in Rwanda," suggest that Dallaire could have drawn such a conclusion. Note the crucial point here, namely the assertion that Dallaire would

have been right to conclude not only that there exists a Samaritan duty to prevent genocide, but also that it would be unreasonable for anyone to deny it. Without this last claim, on Estlund's account of legitimate authority Dallaire would not have been morally justified in acting on his own judgment, rather than deferring to the U.N. and/or its member states (or at least its adequately democratic member states). If true, however, then given the facts as he knew them, Dallaire might well have been justified in disregarding the command to refrain from any act of armed intervention aimed at preventing genocide.¹²

The foregoing argument seeks to provide a justification for Dallaire privileging his own judgment over that of the political body he served on the grounds that agents occasionally enjoy such insight into the truth on a given matter that they may justifiably act on that insight rather than defer to the contrary judgment of a legitimate authority. It may be possible to draw the same conclusion by arguing that Dallaire had good reason to think that those states most closely involved in Rwandan affairs leading up to the genocide were severely biased (e.g., the U.S. after the Somalia fiasco) or suffered from conflicts of interest (e.g., France and Belgium), so that the orders he was given did not issue from a procedure with a (sufficient) tendency to track the truth. This argument, too, nullifies legal orders for purposes of an agent's deliberation.

I want to emphasize that even if Dallaire had no reason to obey U.N., Belgian, etc., orders not to intervene in Rwanda, it does not follow that, morally, he ought to have given a command to intervene. Various other considerations might have entailed the immorality or imprudence of such a command, such as the belief that many of the U.N. troops in Rwanda would not have complied with it (even though, morally, they should have), and rendered his illegal conduct nearly pointless. Moreover, it is possible that even if the risks of harm arising directly from intervention would have been reasonable, the addition of the risk of (morally unjust) punishment

for having acted illegally would have rendered intervention too costly for Dallaire and the other soldiers in Rwanda to have a Samaritan duty to intervene. My point is not to make an all-things-considered argument for what Dallaire should have done. Rather, my aim is only to raise the possibility that in answering this question, Dallaire should not have given any weight to the mere fact that intervention was legally forbidden. If true, then practitioners and theorists alike should pay some attention to the morality of obedience to orders *not* to go to war, as well as orders to do so.

IV.

The qualifications set out in this article should serve to make more palatable Estlund's defense of a duty to obey orders to fight in what is in fact an unjust war. Not only is that duty limited to those serving in the armed forces of democratic states, it is also conditional on the combatant having no good reason to think his democratic state significantly less likely than some other democratic state, or even himself, to judge correctly the justice of the war it wages. While these considerations may make Estlund's position more compelling in the abstract, however, they also place serious limits on its practical implications. At least in the world as we know it (and as it is likely to remain in the foreseeable future), even citizens of democratic states will often have no moral duty to wage war simply because they have been legally ordered to do so.

* I wish to thank Josh Kassner, as well as audiences at the 2009 International Symposium on Military Ethics and ??? the University of Richmond for their comments on an earlier version of this article. I completed this essay while a Visiting Rockefeller Fellow at the Princeton University Center for Human Values, an opportunity for which I am very grateful.

¹ David Estlund, "On following orders in an unjust war," *Journal of Political Philosophy*, 17 (2007), 213–34.

² These two positions are defended by Michael Walzer and Jeff McMahan respectively.

³ Estlund, "On following orders in an unjust war," pp. 215–16.

⁴ In the disproportionate sentence variation on this example, we can imagine that the prisoner has already served what the jailer (rightly) believes to be a period of incarceration proportionate to his offense.

⁵ Note, too, that reasonable disagreement over factual claims are quite common, especially in cases where conclusions must be drawn on the basis of incomplete and even conflicting information, drawn from sources of varying and disputable reliability.

⁶ Jeff McMahan also raises the possibility that on Estlund's argument a combatant may have a duty to obey the commands of a democratic state other than his own. See Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), pp. 68–70. McMahan's charge that democratic states are not especially apt truth-trackers, at least when it comes to waging only just wars, may be less problematic than it seems if democracy turns out to be the epistemically best procedure for resolving reasonable disagreement over what the truth is. See David Estlund, *Democratic Authority* (Princeton, NJ: Princeton University Press, 2008).

⁷ Or, if he defers to someone else's judgment on that matter, he must judge for himself when that agent meets the conditions necessary to justify his or its claim to authority (at least with respect to the justifiability of the state's claim to authority). At some point, individual responsibility for acknowledging, or refusing to acknowledge, another's authority is unavoidable.

⁸ See Lefkowitz, "Democratic Authority and the Particularity Requirement" (Mimeo, Princeton University Center for Human Values, 2009) for a more detailed treatment of the issues raised here.

⁹ Some may maintain, mistakenly in view, that the soldier's consent does generate a duty in this case, albeit one that is overridden by his moral duty not to wage war against those not liable to it. Even if true this view still supports the position defended in the text.

¹⁰ Estlund, "On following orders in an unjust war," p. 218.

¹¹ This depiction of events draws on Romeo Dallaire, *Shaking Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House Canada, 2003), especially pp. 141–51, and Philip Gourevitch, "The genocide fax," *The New Yorker*, May 11, 1998, pp. 42–6.

¹² For a thought-provoking discussion of a Samaritan duty of humanitarian intervention, see Cécile Fabre, "Mandatory rescue killings," *Journal of Political Philosophy*, 15 (2007), 363–84.